IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 9, 2007 Session

TRINA GREEN v. JAMES G. NEELEY, ET AL.

Appeal from the Chancery Court for Maury County
No. 05-251 Stella L. Hargrove, Judge

No. M2006-00481-COA-R3-CV - Filed on June 15, 2007

Claimant appeals the denial of her claim for unemployment benefits, arguing that the denial was not based on substantial and material evidence since the only proof of work-related misconduct offered by her former employer was hearsay. We reverse the judgment of the chancery court, finding that although the hearsay evidence was admissible, the testimony was uncorroborated due to the failure of the unemployment agency to maintain a proper record. Thus, we find that the former employer failed to present substantial and material evidence sufficient to support the denial of Claimant's unemployment benefits.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Renee Andrews-Turner and David Kozlowski, Murfreesboro, Tennessee, for the appellant, Trina Green.

Robert E. Cooper, Jr., Attorney General and Reporter; Lauren S. Lamberth, Assistant Attorney General, for the appellee, James G. Neeley.

OPINION

This case concerns the termination of a state employee and the subsequent denial of her request for unemployment benefits. On December 5, 2002, the Middle Tennessee Juvenile Detention Center (Detention Center) employed Ms. Trina Green as a youth service worker. While Ms. Green was employed at the Detention Center, she was written up several times for various offenses. On November 4, 2004, the Detention Center terminated Ms. Green for allegedly violating company policy by leaving residents in her charge unattended.

On November 16, 2004, Ms. Green filed a claim for unemployment benefits with the Tennessee Department of Labor and Workforce Development, Division of Employment Security (Agency), where she admitted to being discharged for violating a company rule. The Agency thereafter issued a request for separation information from the Detention Center. In response, the Detention Center submitted Ms. Green's discipline form indicating that she had left her "pod" unsecured. The Detention Center also provided a memorandum dated September 17, 2004, which was directed to all youth service workers. The memorandum stated, "Policy states there must be a youth service worker in the pod at all times! If this is not done you will be held accountable! It is cause for termination of [youth service workers] and/or supervisor!"

On December 7, 2004, the Agency denied Ms. Green's claim based on work-related misconduct pursuant to Tenn. Code Ann. § 50-7-303(a)(2). Ms. Green timely appealed to the Appeals Tribunal on December 16, 2004. A telephone hearing was conducted on January 28, 2005, where Mr. Timothy Hicks, Director of the Detention Center, read the discipline form previously submitted to the Agency. Mr. Hicks admitted that he had no first-hand knowledge of the incident. No other persons testified during the telephonic hearing, including Ms. Green who was both present and represented by counsel. On January 31, 2005, the Appeals Tribunal affirmed the Agency's claim denial and made the following findings of fact and conclusions of law:

> FINDINGS OF FACT: Claimant's most recent employment prior to filing this claim was as a youth services worker for Mid-Tennessee Detention Center from December 5, 2002 until November 4, 2004. The claimant was discharged due to three accusations occurring November 4, 2004. A supervisor accused the claimant of leaving an area unsecured and leaving another area unstaffed for twenty-eight minutes. The claimant was also accused for taking a smoke break without her supervisor's permission.
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> CONCLUSIONS OF LAW: The Appeals Tribunal holds the claimant is not eligible for benefits. The issue is whether the employer discharged the claimant for misconduct connected with the work under TCA § 50-7-303(a)(2). Misconduct is conduct that shows a willful or wanton disregard of an employer's interest or disregard of standards of behavior which the employer has the right to expect of its employees. The employer has the burden of proof. In the case at hand, the employer's testimony was hearsay, and the claimant's attorney objected to it. However, hearsay evidence is admissible in administrative hearings. Furthermore, the claimant did not testify, nor did she rebut the employer's testimony. She heard the employer's testimony and was provided opportunity to testify or rebut. The claimant adopted the employer's statements by not saying anything. As such, there is insufficient evidence that taking a smoke break without permission is grounds for immediate discharge. But jeopardizing security measures by leaving an area unsecured or unstaffed is. For these reasons, the claimant is not eligible for benefits.

As a result of the decision, Ms. Green filed an appeal to the Agency's Board of Review. On March 14, 2005, the Board of Review adopted the Appeals Tribunal's findings of fact and

conclusions of law and affirmed its decision. Ms. Green thereafter filed a petition for judicial review in the Chancery Court for Maury County. By order dated February 1, 2006, the Chancery Court affirmed the Board of Review's decision denying Ms. Green unemployment benefits. Ms. Green appeals to this Court arguing that the Agency's decision to deny her unemployment benefits was not based on substantial and material evidence since the only proof offered by her former employer was hearsay.

"In this type of proceeding, the appellate courts use the same standard of review employed by the trial court. However, unlike other civil appeals governed by Tenn.R.App.P. 13(d), no presumption of correctness attaches to the agency's conclusions." *Sutton v. Traughber*, No. 88-309-II, 1989 WL 48782, at *2 (Tenn.Ct.App. May 12, 1989) (internal citations omitted). Tenn. Code Ann. § 50-7-304(i)(2)-(4) provides the standard by which we review administrative decisions concerning claims for unemployment compensation:

> (2) The chancellor may affirm the decision of the board or the chancellor may reverse, remand or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> (A) In violation of constitutional or statutory provisions;
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> (B) In excess of the statutory authority of the agency;
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> (C) Made upon unlawful procedure;
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> (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (E) Unsupported by evidence that is both substantial and material in the light of the entire record.
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> (3) In determining the substantiality of evidence, the chancellor shall take into account whatever in the record fairly detracts from its weight, but the chancellor shall not substitute the chancellor's judgment for that of the board of review as to the weight of the evidence on questions of fact. No decision of the board shall be reversed, remanded or modified by the chancellor, unless for errors that affect the merits of the final decision of the board. Such petition for judicial review shall be heard by the chancellor either at term time or vacation as a matter of right, any other statute of this state to the contrary notwithstanding.
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> (4) It shall not be necessary in any judicial proceedings under this section to enter exceptions to the ruling of the board, but the petition shall distinctly state the grounds upon which the action of the board is deemed erroneous. An appeal may be taken from the judgment and decree of the chancery court having jurisdiction of these

> controversies to the Tennessee court of appeals, in the same manner, but not inconsistent with the provisions of this chapter, as provided in other civil cases.

Therefore, in reviewing the Agency's findings of fact, we are limited to a determination of whether there is substantial and material evidence to support the findings. *Frogge v. Davenport*, 906 S.W.2d 920, 922 (Tenn.Ct.App.1995). "Substantial and material evidence consists of relevant evidence which a reasonable mind might accept to support a rational conclusion and which furnishes a reasonably sound basis for the action being reviewed." *Frogge*, 906 S.W.2d at 922. The General Assembly has determined that "economic insecurity due to unemployment is a serious menace to the health, morals and welfare to the people of this state." Tenn.Code Ann. § 50-7-102(a). Accordingly, the unemployment compensation statutes are liberally construed in the employee's favor and the employer has the burden of proving an employee's disqualification. *Weaver v. Wallace*, 565 S.W.2d 867, 869-70 (Tenn.1978).

To determine whether there was evidentiary support for the findings below, we must examine all the evidence presented to the Appeals Tribunal. *Frogge*, 906 S.W.2d at 922. Testimony during the Appeals Tribunal's telephonic hearing on January 28, 2005, was limited to that of Mr. Hicks. Mr. Hicks was not present during the early morning hours of November 4, 2004, when the events which led to Ms. Green's termination transpired. Therefore, his testimony was confined to the information provided in Ms. Green's disciplinary form. Mr. Hicks testified:

> Mr. Hicks — The write-up that I have from her supervisor is dated 11/4/04.
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> [Reading from the Detention Center disciplinary form] On the date of 11/4/2004 at 1:22 a.m. north pod was left unsecured. No staff in pod for a period of 28 minutes. This is a direct violation of company policy. You also went on a smoke break without informing shift supervisor. This is a violation of company and shift policy.

Ms. Turner, Ms. Green's attorney, objected to Mr. Hicks' testimony, complaining that the disciplinary form was not part of the record and that the reading of the disciplinary form constituted inadmissible hearsay. After noting Ms. Turner's objection to the admission of the evidence, the hearing officer, Ms. Stephenson, responded that hearsay was admissible in administrative proceedings but that she would weigh the testimony accordingly. As an aside, Ms. Stephenson admitted that there was also no documentation in the Agency's file.

> Ms. Turner — At this time we're objecting to the reading of that document. It's not been - it's hearsay basically. I mean, there's nothing to substantiate the purpose of that document being –

Ms. Stephenson	Yes, ma'am. I'm very well aware it's hearsay, but it's also a business - well, it's in - I would think it was in the course of the business that they –
Ms. Turner	I mean, I'm just –
Ms. Stephenson	– documentation.
Ms. Turner	Well, I guess my problem is it's not part of the record as well. That's what we're - because one of my purposes of requesting the record was to see what was submitted by the employer.
Ms. Stephenson	I'm sorry. Say that again.
Ms. Turner	One of the reasons we requested a copy of the record was also to see what the employer submitted –
Ms. Stephenson	Oh, okay.
Ms. Turner	– and I'm saying that was not part of the record as well as to exactly why Ms. Green was terminated because on the Separation Notice it doesn't state that.
Ms. Stephenson	Right. And I don't have any documentation either in my record, but right now –

Tenn. Code Ann. § 4-5-319(a) requires that the Agency maintain an official record in a contested case. Pursuant to Tenn. Code Ann. § 4-5-319(b), the record must contain "(1) Notice of all proceedings; (2) Any pre-hearing order; (3) Any motions, pleadings, briefs, petitions, requests and intermediate rulings; (4) *Evidence received or considered*; (5) A statement of matters officially noticed; (6) Proffers of proof and objections and rulings thereon; (7) Proposed findings, requested orders, and exceptions; (8) The tape recording, stenographic notes or symbols, or transcript of the hearing; (9) Any final order, initial order, or order on reconsideration; (10) Staff memoranda or data submitted to the agency unless prepared and submitted by personal assistants and not inconsistent with § 4-5-304(b); and (11) Matters placed on the record after an ex parte communication." (Emphasis added). Tenn. Code Ann. § 4-5-319(d) further provides that "the agency record shall constitute the exclusive basis for agency action in adjudicative proceedings under this chapter, and for judicial review thereof."

It is clear from the transcript of the telephonic hearing that the Appeals Tribunal did not maintain a proper record in this case as required by Tenn. Code Ann. § 4-5-319. The hearing officer admitted that Ms. Green's disciplinary form was absent from her file and we must assume from her statement, "I don't have any documentation either in my record," that the file also did not contain Ms. Green's claim for unemployment benefits, the Detention Center's response to the Agency's request for separation information, or the Agency's denial of Ms. Green's claim. However, these documents are, for whatever reason, now present in the appellate record. Judicial review of an administrative decision "is confined to a narrow and statutorily prescribed review of the record made

before the administrative agency." *Metro. Gov't of Nashville and Davidson County v. Shacklett*, 554 S.W.2d 601, 604 (Tenn.1977). Therefore, none of these documents, including the disciplinary form, can be considered on appeal.

Thus, the only evidence supporting the Appeals Tribunal's findings of fact and conclusions of law is the uncorroborated hearsay testimony of Mr. Hicks. "Although hearsay is admissible in administrative hearings, uncorroborated hearsay does not constitute substantial and material evidence." *Estate of Milton v. Commissioner, Tenn. Dep't of Employment Sec.*, No. 03A01-9710-CH-00449, 1998 WL 282919, at *2 (Tenn.Ct.App. May 19, 1998). Thus, "hearsay testimony and documents may be used, if properly qualified for admission, to corroborate other testimony of the wrongful acts of the claimant, but not as the sole evidence of his or her wrongful acts." *Johnson v. Neel*, No. 86-150-II, 1986 WL 14039, at *3 (Tenn.Ct.App. Dec. 12, 1986). This Court has held:

> Mr. William Hardwick, the VA personnel officer, was the sole witness to appear for the VA. he admitted that he did not have personal knowledge of Mr. Johnson's work performance, and that Mr. Jonhson's immediate supervisor, who did have personal knowledge, could have been at the hearing but "we felt like the record spoke for itself."
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> Mr. Johnson failed to object to the introduction of certain records on which the Board based its decision in disallowing benefits. While Mr. Johnson thereby waived any objections to the admissibility of documents offered by the VA, *Anderson v. Carter*, 512 S.W.2d 297, 307 (Tenn.App.1974), those documents are hearsay and, standing alone, cannot support a finding of misconduct such as would prevent Mr. Johnson's entitlement to unemployment compensation benefits.
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> This Court, in *Goodwin v. Metropolitan Board of Health*, 656 S.W.2d 383, 388 (Tenn.App.1983), stated: "Uncorroborated hearsay or rumor would not constitute 'substantial evidence' where the scope of review was limited to a search for 'substantial evidence.'" We have also applied this rule in appeals involving unemployment compensation claims. In 1983, this Court stated:
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> > Some states have adopted a rule either by legislation or by administrative action, that in cases such as this the hearsay testimony and documents may be used, if properly qualified for admission, to corroborate other testimony of the wrongful acts of the claimant, but not as the sole evidence of his or her wrongful acts. We think such a rule has merit and adopt it for cases involving unemployment compensation cases which are filed after the date of this decision.
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> *Grantham v. Bible*, Summer Eq., slip on op. at 6-7 (Tenn.App., March 10, 1983), 1C *Unempl.Ins.Rep.*(CCH) ¶ 8298.
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> The documents introduced by the VA without objection are not corroborated. They are the only evidence in the record which supports even a semblance of

> misconduct on the part of plaintiff. Without the documents, there is not even a scintilla of proof that the plaintiff is guilty of misconduct. The competent proof shows only that the plaintiff was unable to do his job as a result of his inability to do so. He was, at most, guilty of ordinary negligence in failing to report his failure to retrieve records, and this in an isolated incident.

Johnson, No. 86-150-II, 1986 WL 14039, at *3.

Because Ms. Green's disciplinary form was not properly entered into evidence and the only other evidence of Ms. Green's work-related misconduct was Mr. Hicks' uncorroborated hearsay testimony, we find that the record does not contain substantial and material evidence to support the findings of the Agency. The judgment of the chancery court is reversed, and the case is remanded for further proceedings consistent herewith. Costs of appeal are assessed against Appellees.

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WILLIAM B. CAIN, JUDGE